Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Implementation of the Cable Television	)	
Consumer Protection and Competition	)	MM Docket No. 92-259
Act of 1992	)	
	)	
Broadcast Signal Carriage Issues	)	

OPPOSITION TO PETITIONS FOR RECONSIDERATION

The National Cable Television Association ("NCTA"), by is attorneys, hereby submits its Opposition to the Petitions for Reconsideration and/or Clarification filed by the Association of Independent Television Stations ("INTV"), the National Association of Broadcasters ("NAB"), A.C. Nielsen Company ("Nielson"), Moran Communications ("Moran"), and the Wireless Cable Association International, Inc. ("WCA"). NCTA is the principal trade association of the cable television industry in the United States.

I. Mandatory Carriage Rules

A. Copyright Issues

The Act and the Commission's rules make clear that an operator need not carry a station that would be considered distant for copyright purposes, unless that station agrees to indemnify the system "for any increased copyright liability resulting from carriage on the cable system."[1] NAB and INTV propose new requirements with respect to copyright indemnifications that will increase disputes and frustrate the Act's purpose of making operators whole for increased copyright liability. Their suggestions should be rejected.

[1] Id. at § 614(h)(1)(B)(ii).

First, INTV asks the Commission to rule that "stations should be required to pay no more than a pro rata share of the first accounting period for carriage after June 2."[2] But, under the Copyright Office rules, no proration of copyright liability is allowed if a distant broadcast signal is carried for even a single day in an accounting period.[3] Therefore, distant signals added after June 2 must bear the full cost of carriage for the entire copyright accounting period ending June 30.

Second, NAB and INTV propose that stations should be able to discontinue their indemnification at some point during the three-year election period -- either, as INTV proposes, after "one or more specific semi-annual accounting periods" or, as NAB suggests, after one year, upon 60 days notice prior to the next semi-annual accounting period. Given that stations are required to elect between must carry and retransmission consent for a three year period, allowing operators to require a station to agree to an indemnification covering that entire three year period is entirely appropriate. Otherwise, a station could "opt out" of must carry status during the middle of the three year election period and essentially change its election to retransmission consent. This would contravene the purpose of establishing a one-time election effective for three years.

Third, INTV seeks to escape the need for payment altogether by suggesting the Commission adopt the fictitious "presumption" that all stations are "significantly viewed" throughout their ADI.[4] INTV opines that "such a presumption . . . would assure that superimposing the 1976 must carry rules on the requirements in the Act did not have the

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2 INTV Petition at 5.

3 37 C.F.R. Section 201.17(f)(2)(1) ("where a cable system carries a primary transmitter on a full-time basis during any portion of an accounting period, the system shall compute a DSE for that primary transmitter as if it was carried full-time during the entire accounting period").

4 INTV Petition at 6.

effect of defeating the operation of the new rules."[5] But in fact, INTV's proposal would have the effect of defeating the intent of the Act -- which specifically excludes from must carry coverage stations that would be considered distant signals for which copyright liability would accrue unless those stations agree to indemnify cable operators for increased copyright liability. INTV's approach artificially presumes that no stations in an ADI would be considered "distant" -- because all "significantly viewed" stations would have been "local" under the 1976 must carry rules. But in so doing, it would fundamentally - and improperly -- shift the burden to operators to rebut this presumption.

Finally, both INTV and NAB seek Commission clarification of how copyright liability attributable to carriage of a particular station should be calculated.[6] The calculation of expected copyright liability for carriage of a particular broadcast signal is a difficult task. But these difficulties would only be compounded if the broadcasters' proposals are adopted.

The rates for carriage of distant signals are established in the Copyright Act. A cable operators' ultimate liability -- and distant broadcasters' share thereof -- are a function of application of a statutorily established formula. There is, therefore, no threat that an operator will manipulate the process to charge broadcasters more than their fair share.

But enabling broadcasters to negotiate with operators over which rate should be attributable to a particular broadcast signal would open the door to protracted negotiations leading to nowhere. Given the range of royalty rates for carriage of distant signals, and the very real possibility that distant stations will have to be added at the 3.75% penalty rate, the only way to make this work is to enable the cable operator to designate carriage of which distant signal accounts for which incremental cost.

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[5] Id.

[6] NAB Petition at 11; INTV Petition at 7.

NAB's attempt to work out a mathematical solution only serves to demonstrate

Indeed, the language of the Act states that the Commission "with respect to a particular television broadcast station" may add or exclude communities "from such station's television market."[10] It would do violence to this statutory language -- and to the intent of the Act -- to allow all stations in one ADI to force an operator located in a community in a different ADI to carry them merely because a single station in that ADI made the requisite showing warranting expansion of its market.

C. Default Election Channel Positioning Rights

In adopting rules governing stations that fail to elect between must carry and retransmission consent on June 17, the Commission conferred on such stations automatic rights to mandatory carriage . NAB now argues that this is not enough, and that these stations should also be entitled to channel positioning rights as well.[11] NAB suggests that operators should, in these circumstances, have "discretion to choose from among [the options listed in the statute] in the event of a default . . . ."

NAB seeks to justify this proposal on the grounds that it would be an "additional incentive [for a station] to make an affirmative election". This purported justification is completely illogical. A broadcaster under NAB's scheme would have no incentive to make any election, knowing that it already would be afforded preferential carriage rights on one of several specified channels.

The Commission is determined that must carry should be the default based on its concern that a cable operator otherwise would be "without any means of acquiring access to a signal for its subscribers."[12] There is no justification for extending channel positioning privileges as well to stations that do not care enough about cable carriage to

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[10] Section 614(h)(c).

[11] NAB Petition at 7.

[12] Report and Order at ¶ 159.

express any interest in it. The Commission should, at the very least, leave to cable operators discretion where, on their basic tier, these stations should be placed.

D. Determination of Whether Material is "Program-Related"

Several petitioners -- including NAB, Nielsen, and INTV -- seek reconsideration of the Commission's decision to use the factors enumerated in the WGN Continental Broadcasting decision as guidance for determining whether material in the vertical blanking interval of a must carry signal is "program related." In objecting to this definition, however, the petitioners appear to misread the statute.

Congress made clear that "retransmission of other material in the vertical blanking interval or other nonprogram-related material (including teletext and other subscription and advertising-supported information services) shall be at the discretion of the cable operator."[13] As the House Report explains, this provision was not intended to "be used to require carriage of secondary uses of the broadcast transmission, including the lease or sale of time on subcarriers or the vertical blanking interval for the creation or distribution of material by persons or entities other than the broadcast licensee."[14] The House Report further describes that "program-related material is meant to include integral matter such as subtitles for hearing-impaired viewers and simultaneous translations into another language. It is not meant to include tangentially-related matter such as reading list shown during a documentary or the scores of games other than the one being telecast or other information about the sport or particular players."[15]

NAB objects to the Commission's use of the WGN test and proposes a significantly different -- and virtually unbounded -- test:

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[13] Section 614(b)(3).

[14] House Report at 93.

[15] Id. at 101.

> If a broadcaster transmits information on a subcarrier or in its VBI, it should be carried by cable systems which retransmit the broadcaster's signal unless the material is wholly unrelated to the primary program. Material which provides information supplementing the main program service should be deemed to be program related. Only if the material is part of a service separately provided to subscribers or consumers, the contents of which [. . .] are not established by reference to the main program service, should cable systems be allowed to choose not to carry it as part of a retransmitted broadcast signal.[16]

It is impossible to square this sweeping interpretation of "program-related" with Congress' intent, as described above, to narrowly circumscribe the VBI material that cable operators must carry. Indeed, under NAB's "test", virtually any use of the VBI claimed to be related in some way -- no matter how tangentially -- to the primary program would be covered. This is clearly not what the statute requires. The Commission should not modify its rules.

E. Qualified Low Power Television Stations

[redacted]

Commission has authority to waive the statutory requirement in unique circumstances, it has no power to rewrite the statute to potentially grant expanded must carry rights to all LPTV station, as Moran seeks.

II. RETRANSMISSION CONSENT

A. Carriage of Stations Electing Retransmission Consent

NAB and INTV seek "clarification" that even though stations elect to forgo their must carry rights and choose retransmission consent instead on June 17, cable operators nonetheless should be forced to carry them until October 6, 1993.[20] This totally subverts the intent that broadcasters must choose either must carry or retransmission consent -- they cannot have it both ways.

The Act is quite clear in making the June 17 election an "either/or" choice. Section 325(B)(4) provides that "if an originating television station elects under paragraph 3(B) to exercise its rights to grant retransmission consent under this subsection with respect to a cable system, the provisions of Section 614 shall not apply to the carriage of the signal of such station by such cable system."[21] In short, once the retransmission consent election is made, must carry rights are forfeited.

[redacted]

dwellings . . ., provided that these signals are available without charge at the resident's option. That is, the antenna facilities must be owned by the individual subscriber or building owner and not under the control of the multichannel video programming distributor."[23] WCA, however, urges revision to this definition to eliminate the need to obtain consent where the MMDS operator owns or controls the rooftop antennas, provided it does not charge its subscribers for broadcast signals. This proposed revision would create an enormous loophole for competing providers of video programming service that cannot be squared with the Act.

If MMDS and SMATV operators were able to escape retransmission consent altogether by providing local broadcast signals to subscribers "at no charge", or so long as the subscriber has the right to purchase the antenna facilities upon termination of service. These video distributors competing with cable operators could easily structure their rate schedule to altogether avoid incurring retransmission consent obligations. This would enable multichannel video programming distributors to evade Congress' clear intention that with respect to retransmission consent, all multichannel video programming distributors stand on the same footing. This attempt by MMDS operators to gain a competitive advantage over cable systems and take themselves outside the constraints of retransmission consent cannot be squared with the Act and should not be adopted.

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[23] 47 C.F.R. §76.64(e).

CONCLUSION

For the foregoing reasons, NCTA opposes the petitions described herein.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I Leslie D. Heath, do hereby certify that on this 7th day of June, 1993, copies of the foregoing "Opposition to Petitions for Reconsideration" were served by first-class postage pre-paid mail to the following parties:

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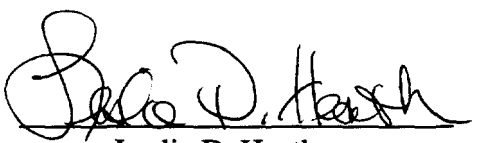

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